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Supreme Court, U.S.
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No. 95-247

In The

Supreme Court of the United States

October Term, 1995

MEREX A.G. and PETER C. LACHMANN,

Petitioners,

v.

FAIRCHILD WESTON SYSTEMS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court acted properly in denying Peter Lachmann's motion to rescind the settlement agreement that he voluntarily entered into during trial more than two years earlier.

2. Whether the District Court acted within its discretion in holding plaintiffs' counsel, Daniel J. O'Callaghan, in contempt for his repeated refusals during trial to comply with the Court's ruling concerning the proper scope of the testimony to be read back to the jury during their deliberations in response to Jury Request Number 7.

3. Whether the Second Circuit had subject matter jurisdiction to decide plaintiffs' appeal from the May 30, 1994 order of United States District Court Judge Mary Johnson Lowe.

PARTIES

Respondent, Fairchild Weston Systems Inc., was a wholly owned subsidiary of Schlumberger Limited, Schlumberger Technology Corporation and Sangamo Weston, Inc. On July 27, 1989 – during the pendency of this action – the assets and liabilities of Fairchild Weston Systems Inc. were purchased by Loral Computer Systems Corporation, which subsequently changed its name to Loral Fairchild Corp. Loral Fairchild Corp. is a subsidiary of Loral Corporation. Respondent is referred to in this brief as Fairchild.

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STATEMENT OF THE CASE[1]

Peter Lachmann commenced this action in August, 1985 to recover a $1.2 million commission allegedly owing under a 1983 sales representation agreement with Fairchild. His complaint alternatively alleged breach of contract, *quantum meruit* and promissory estoppel.[2]

Fairchild contended throughout the case that Lachmann's breach of contract claim was barred by the express terms of his written agreement, which plainly and unambiguously conditioned Lachmann's commission upon Fairchild's sale of camera systems ***to Merex*** for resale to the People's Republic of China – a transaction that undisputedly never occurred. Fairchild also contended that the existence of this written contract precluded Lachmann as a matter of law from recovering on alternative theories such as *quantum meruit* and promissory estoppel.

During trial, the District Court urged the parties to settle Lachmann's claims, and Lachmann agreed to accept Fairchild's offer of $150,000. The settlement was then placed on the record. Lachmann's counsel, Daniel J. O'Callaghan ("O'Callaghan"), represented to the District Court that he recommended that Lachmann accept the

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[1] Fairchild adopts and incorporates by reference the summary of facts and proceedings contained in the Second Circuit's summary order, dated April 7, 1995 (*see* Appendix B at 6a-7a).

[2] Co-plaintiff Merex A.G. ("Merex") also sought damages from Fairchild under various alternative theories of recovery. Merex's claims were dismissed after trial (810 F. Supp. 1356 (S.D.N.Y. 1993)), the District Court's dismissal was affirmed by the Second Circuit (29 F.3d 821 (2d Cir. 1994)) and the Supreme Court denied Merex's petition for certiorari on January 9, 1995.

settlement amount. In response to the District Court's questions, Lachmann stated unequivocally that he wished to accept the settlement amount and understood that, by doing so, he was settling with finality his claims against Fairchild. Lachmann thereafter accepted Fairchild's settlement check in the amount of $150,000 and executed a general release in favor of Fairchild.

Following the settlement of Lachmann's claims, the trial continued as to Merex's promissory estoppel claim, with the jury sitting in an advisory capacity. During jury deliberations, by Jury Request No. 7, the jury requested a reading of the trial testimony of Merex's principal, G.G. Mertins, regarding: (1) his discussions with Mr. Neasham of Fairchild about the structure of the sale with China, especially the mode of payment and (2) his testimony regarding the feasibility of a sale/resale transaction. The District Court instructed counsel to identify proposed, appropriate portions of the transcript overnight, to be read to the jury the following morning.

When the trial resumed, the District Court ruled that Jury Request No. 7 called for a reading of Mr. Mertins' testimony only with respect to his ***direct discussions*** with Mr. Neasham regarding the specific issues identified by the jury. Based on this ruling, Fairchild's counsel elected not to propose a number of transcript portions contained on the preliminary list that counsel had prepared in advance of the court session. In sharp contrast, and despite the Court's repeated admonitions, O'Callaghan persisted in proposing to read to the jury numerous transcript portions that had nothing whatsoever to do with Jury Instruction No. 7, as interpreted by the District Court.

Exasperated by O'Callaghan's refusal to abide by its orders, the District Court held O'Callaghan in contempt three separate times. When O'Callaghan then attempted repeatedly – in defiance of the Court's ruling – to have the preliminary lists marked as exhibits, the Court issued a fourth contempt citation and later set the total fine for contempt at $400.

In February, 1994 – nearly two years after the conclusion of the trial – appellants moved to rescind the Lachmann settlement and to seek relief from the contempt citations. By order dated May 30, 1994, the District Court denied the motion (*see* Appendix A). The Second Circuit affirmed (*see* Appendix B) and also rejected some six separate motions by Lachmann and O'Callaghan seeking various relief (*see* Appendices C, E, F, G, H and I). The instant petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Lachmann's petition for a writ of certiorari should be denied because the petition does not establish any "special and important reasons" for granting the writ, as required by Rule 10 of the Rules of this Court.[3] To the

[3] The petition also should be denied pursuant to Rule 14.5 of the Rules of this Court because it is inadequate on its face in that it fails to clearly and accurately present the points that Lachmann believes to require consideration. Indeed, the petition is largely devoted to a re-hash of issues concerning the conduct of the trial on Merex's claims. These issues are entirely irrelevant to this appeal and, in any case, for the most part already have been rejected by the Supreme Court's denial of Merex's previous certiorari petition.

contrary, the record in this case establishes that the decision below turned on its own facts. Moreover, the District Court's denial of Lachmann's motion to rescind his settlement agreement was correct and followed precedent (*see* 1 below); its contempt citations against O'Callaghan involved the sound exercise of its discretion (*see* 2 below). Finally, Lachmann's assertion that the Second Circuit lacked subject matter jurisdiction to decide his appeal because the District Court order appealed from (Appendix A) was not a "final judgment" is frivolous (*see* 3 below).

1. The District Court Properly Denied Lachmann's Motion To Rescind His Settlement Agreement For Duress

In affirming the District Court's denial of Lachmann's February, 1994 motion to rescind the settlement agreement he voluntarily entered into during trial two years earlier, the Second Circuit relied upon well-settled case law for the proposition that a settlement agreement is a binding contract that can be rendered voidable on grounds of duress only upon a showing that the party's assent was induced by an improper threat that left the party with no reasonable alternative but to agree (Appendix B at 7a). It then agreed with the District Court that the trial record showed that Lachmann had voluntarily entered into the settlement agreement, and concluded that there was no wrongful conduct in the District Court's prodding Lachmann to settle (Appendix B at 7a-8a, citing *Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990)). Finally, the Second Circuit held that permitting Lachmann to rescind under

the circumstances of this case would violate well-settled judicial and public policies favoring out-of-court settlements and would also deprive Fairchild of its bargained-for right to avoid further proceedings with Lachmann (Appendix B at 8a, citing *Janneh*, 887 F.2d at 436).

The Second Circuit's determinations were correct in that they applied the undisputed facts to well-established principles of law. Indeed, Lachmann's assertion of duress was insufficient as a matter of law for two separate reasons.

First, Lachmann did not even come close to satisfying any of the four requirements for proving economic duress, *to wit*: (a) a threat; (b) unlawfully made; (c) which caused involuntary acceptance of contractual terms; (d) because the circumstances permitted no alternative. *U.S. West Financial Services, Inc. v. Tollman*, 786 F. Supp. 333, 338-340 (S.D.N.Y. 1992). Indeed, Lachmann did not even allege the existence of any "threat" from Fairchild but, rather, claimed to have been coerced by his fear of losing at trial. Such a fear is legally insufficient to support a claim to rescind a settlement agreement for duress. *See Janneh, supra*, 887 F.2d at 437.

Similarly, there was no showing of unlawful conduct by Fairchild or the District Court; of Lachmann's involuntary acceptance of the settlement; or of the absence of a practical alternative to Lachmann's acceptance of the settlement. To the contrary, the trial record established that Lachmann evaluated his options and knowingly elected to settle his claim rather than incur the additional time and expense necessary to continue to pursue the case through the end of trial and any appeals. This scenario –

which is a regular occurrence in civil/commercial litigation – does not give rise to a claim for economic duress. *See, e.g., Record Club Of America, Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 216 (S.D.N.Y. 1975) (Court declined to rescind a settlement agreement and release on duress and economic coercion grounds, ruling that plaintiff had a practical alternative to entering into the release – negotiating a narrower release).

Second, and even assuming for purposes of Lachmann's arguments that he did agree to the settlement under duress, he still would not be entitled to rescind it at this late date. The existence of duress would merely render the settlement voidable, not void. *See U.S. West Financial Services, Inc., supra*, 786 F. Supp. at 340. Lachmann therefore would be deemed to have ratified the settlement, thus barring his present attempt to rescind, unless he repudiated the settlement in a timely manner. *Id.* at 341. The record establishes that Lachmann did not make any such timely repudiation.

To the contrary, Lachmann waited nearly two years after accepting the benefits of the settlement before attempting to challenge it. At that time, he gave no explanation for his delay. Thus, there is no question that Lachmann ratified the settlement by his failure to repudiate it in a timely manner.[4]

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[4] Lachmann's reliance on *Polito v. Polito*, 121 A.D.2d 614, 503 N.Y.S.2d 867 (2d Dep't 1986), for the proposition that the "timing of Lachmann's motion to vacate does not preclude this relief" (petition at 24, note 15) is wildly misplaced. In that case, an 18 month delay in a plaintiff wife's bringing an action to rescind a divorce settlement was excused due to unique and

Lachmann's petition makes no serious attempt to rebut this overwhelming legal and factual record. Rather, it merely cites *Janneh, supra,* 887 F.2d at 432-433, for the general proposition that "settlement agreement may be challenged upon showing that signed under pressure" (petition at 24). This misses the point, since neither Lachmann nor the plaintiff in *Janneh* made the factual showing necessary to establish duress.[5]

In short, the Second Circuit's determination here fully considered and correctly decided the issue of Lachmann's entitlement to rescind the settlement he entered into during trial, and Lachmann has not raised any issue on this point for review under Rule 10 of the Rules of this Court. Accordingly, Lachmann's petition should be denied.[6]

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special circumstances – the record showed that the wife had been a victim of a pattern of physical and mental spousal abuse that, following the settlement, had led to a suicide attempt and psychiatric hospitalization. The record in the instant case is devoid of any similar circumstances that would justify or excuse Lachmann's two-year delay in seeking rescission.

[5] Lachmann's reliance upon *Kothe v. Smith,* 771 F.2d 667 (2d Cir. 1985) (petition at 24) for the proposition that the District Court acted improperly by encouraging him to settle is also misplaced. In *Kothe,* the Second Circuit reversed a District Judge's imposition of sanctions on defendant for its settlement during trial in an amount that the Judge had recommended during a pre-trial conference, holding that such conduct was beyond the Judge's power under Fed. R. Civ. P. 16. *Kothe* is therefore entirely irrelevant to the instant appeal.

[6] Even assuming for purposes of Lachmann's arguments that he were somehow entitled to rescind the settlement agreement, any such rescission should require his immediate, unconditional return to Fairchild of its $150,000 settlement payment,

2. The District Court Properly Acted Within Its Sound Discretion When It Held O'Callaghan In Contempt

It is well-established that a District Court has broad discretion to fashion an appropriate coercive remedy in a case of civil contempt, and its determination will not be disturbed absent a clear showing of abuse of discretion. *N.A. Sales Co., Inc. v. Chapman Industries Corp.*, 736 F.2d 854, 857 (2d Cir. 1984). In circumstances involving trial counsel, three types of courtroom misconduct are typically recognized as being subject to contempt: (a) refusal to obey court orders; (b) disrespectful remarks to the Court; and (c) excessive or repetitive argument. *U.S. v. Lumumba*, 794 F.2d 806, 809 (2d Cir. 1986). Moreover, other behavior of the lawyer during trial can be considered in determining whether a particular act is sufficiently contumacious to constitute contempt. *Id.* at 811-813.

Given these standards – which the petition conveniently ignores – there is no question that the District Court acted well within its discretion in holding O'Callaghan in contempt. The trial record established that O'Callaghan willfully refused to obey – and then engaged in excessive and repetitive argument over – the District Court's order regarding the proper scope of trial testimony to be read back to the jury in response to Jury Request No. 7. This conduct – which came near the end of a 2 and 1/2 week trial and threatened to delay and

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together with interest from May, 1992. *See* New York C.P.L.R. § 3004 (McKinney's 1991).

disrupt the orderly judicial process – was properly viewed in the context of O'Callaghan's other behavior during trial. Under these circumstances, the fines that the District Court levied against O'Callaghan were modest.

Unable to show that the District Court abused its discretion by holding O'Callaghan in contempt, the petition does not even attempt to do so. Instead, it cites Fed. R. Civ. P. 51 and several cases applying that Rule for the proposition that a lawyer has the duty to preserve for appeal each of his objections to a court's jury charge (petition at 24-25). These cases are entirely irrelevant to the contempt citations issued against O'Callaghan, which had nothing whatsoever to do with the Court's jury charge. Accordingly, the petition does not raise any question on this point for review by the Supreme Court.

3. The Second Circuit Had Subject Matter Jurisdiction To Decide Plaintiffs' Appeal

No doubt recognizing the weakness of the merits of their appeal, plaintiffs contended for the first time following oral argument before the Second Circuit that the appellate court lacked jurisdiction over their own appeal because the order they appealed from was not a "final judgment." This contention is frivolous.

Specifically, the May 30, 1994 order appealed from (Appendix A) complied on its face with Fed. R. Civ. P. 54 (a) and 58 in that it was set forth on a separate piece of paper, was denominated an order and constituted a final decision from which an appeal as of right lay, in accordance with 28 U.S.C. § 1291. The petition (at 23) merely

references the general rule; it cites no authority supporting dismissal of the appeal for lack of subject matter jurisdiction based on the circumstances presented here. Accordingly, it raises no issue for review by this Court.

CONCLUSION

For these reasons, Fairchild respectfully requests that this petition for a writ of certiorari be denied.

Melville, New York
September 8, 1995

Respectfully submitted,

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